

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

TRACY LYNN HIGELMIRE,

Defendant-Appellee.

UNPUBLISHED

November 10, 2011

No. 300081

Eaton Circuit Court

LC Nos. 10-020178-FH

10-020181-FH

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant pleaded guilty to first-degree home invasion, MCL 750.110a(2), second-degree home invasion, MCL 750.110a(3), possession of burglary tools, MCL 750.116, and possession of marijuana, MCL 333.7403(2)(d). The circuit court departed downward in sentencing defendant to 365 days in jail, with credit for 25 days served, and three years' probation. Plaintiff appeals by leave granted. Because the sentencing court failed to articulate substantial and compelling reasons based on objective and verifiable factors to justify the downward departure, we reverse and remand for resentencing.

Plaintiff challenges the sentencing court's downward departure from the sentencing guidelines. We review for clear error a sentencing court's reasons cited for a guidelines departure. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). The objectivity and verifiability of a reason to depart is reviewed as a matter of law, and whether a reason is substantial and compelling enough to justify the departure is reviewed for an abuse of discretion. *Id.* An abuse of discretion occurs "if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

A sentence must be within the appropriate guidelines range unless the sentencing court has a "substantial and compelling reason" to depart from that range. MCL 769.34(2) and (3). A substantial and compelling reason is an "'objective and verifiable' reason that "'keenly" or "irresistibly" grabs our attention"; is 'of "considerable worth" in deciding the length of a sentence'; and 'exists only in exceptional cases.'" *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003), quoting *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995). An objective and verifiable reason is one that is "external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed." *People v*

Abramski, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must state on the record the reasons for departure. MCL 769.34(3).

Here, the lower court articulated the following reasons for departing from the sentencing guidelines: (1) defendant might become eligible for the Special Alternative Incarceration (SAI) Boot Camp program following its restructuring; (2) she would serve less time in prison than in jail; (3) she has the support of family and community members; (4) her crimes were an aberration because of the effect of prescription drugs; and (5) defendant's substance-abuse problem could be better monitored on probation than in the prison system.

That defendant might become eligible for SAI Boot Camp is not an objective and verifiable reason because it is not external to the mind of the sentencing court. The record contains no information regarding whether the boot camp guidelines were likely to change other than the sentencing judge's statement that he had heard speculation to this effect, which is not external to the mind of the court. That defendant would qualify for the program even if the guidelines were to change is also speculative and thus unverifiable.

The sentencing court's second justification for departing, that defendant would be released from prison earlier than if the court imposed a one-year jail sentence, is speculative and cannot be confirmed. It is also unclear how the court arrived at this determination given that it merely stated the matter as fact, which precludes effective appellate review. *Smith*, 482 Mich at 304. Without more, the sentencing court's determination regarding this factor is not external to the court's mind, and thus cannot be a valid reason to depart.

The third reason that the sentencing court articulated for departing from the guidelines—that defendant's conduct was an "aberration" because prescription drug addiction can cause people to become "frantic,"—also does not support the departure. It is not at all uncommon for a substance abuse problem to lead to the commission of a crime. This reason is therefore not compelling because such an ordinary event does not "keenly" or "irresistibly" grab one's attention. It also cannot be said that such a circumstance renders this situation "exceptional." *Babcock*, 469 Mich at 257.

Further, the sentencing court's conclusion that the crimes were out of character for defendant is not objective because it is not external to the court's mind. "[A] trial court's mere opinion or speculation about a defendant's general criminal propensity is not, in itself, an objective and verifiable factor[.]" *People v Horn*, 279 Mich App 31, 45; 755 NW2d 212 (2008). Objective and verifiable factors underlying that opinion, however, can be valid reasons. *Id.* Defendant's strong support network, the sentencing court's fourth reason for departing from the sentencing guidelines, is such an objective and verifiable factor. The court repeatedly noted defendant's strong support as evidenced by the 27 letters written on her behalf and the people supporting her in the courtroom during sentencing. While the content of the letters may not be objective or verifiable, the fact that she has support is. In *Fields*, 448 Mich at 78, our Supreme Court cited with approval *People v Harvey*, 203 Mich App 445, 448; 513 NW2d 185 (1994), in which this Court affirmed a downward departure because the defendant, among other factors, had the support of his family. Plaintiff here argues that the letters taken together are not compelling. Clearly, the trial court was impressed by the 27 letters written in support of defendant, as well as the presence of many supporters at her sentencing hearing. As an appellate

tribunal we are mindful that we should defer to “the trial court’s extensive knowledge of the facts and that court’s direct familiarity with the circumstances of the offender.” *Babcock*, 469 Mich at 270.

Finally, the fifth factor that the sentencing court articulated in support of its downward departure is not objective or verifiable. Whether defendant’s substance abuse problem can be better monitored while she is on probation locally rather than in the prison system is a subjective determination that is not external to the court’s mind.

Defendant also argues that the sentencing court departed downward because: (1) her culpability warranted a more lenient sentence; (2) the victims did not request a harsh punishment; (3) she has a solid employment history; (4) she underwent substance-abuse treatment; and (5) at 44 years old, she had no prior criminal history. Contrary to defendant’s contention, the court did not cite these reasons in support of its departure. Moreover, this Court will not substitute its own reasons for those that a sentencing court articulated on the record. *Id.* at 258-259.

Where the sentencing court relies on both valid and invalid reasons to support a departure, we must determine whether the court would have departed to the same degree relying on the valid reasons alone. *Id.* at 260. Because we are unable to make this determination from the record, we remand to the sentencing court for resentencing. In resentencing defendant, the court may consider any objective and verifiable reasons that currently exist.

Reversed and remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio